

Fourth Amendment Searches of the Home in Florida: *State v. Rabb*: Has the Florida Fourth District Court of Appeals Barked Up the Wrong Tree?

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I. INTRODUCTION

The use of drug dogs in the United States began in 1970 when the United States Customs started using dog sniffs to detect the presence of contraband.¹ This practice raised the Fourth Amendment issue of whether the use of a dog sniff required probable cause and a warrant.²

In *United States v. Place*,³ the United States Supreme Court found that a dog sniff is not a Fourth Amendment search because it is “less intrusive than a typical search” and because it reveals only “the presence or absence of narcotics.”⁴ Since that decision, some State courts have interpreted their constitutions to hold that a dog sniff is an unreasonable search.⁵ However, under Article I, Section 12 of the Florida Constitution, the right to be free from unreasonable searches and seizures “shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court.”⁶ The Fourth Amendment to the United States Constitution provides that: “The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁷

1. Barbara Tarlow, Note, *Dog Sniff Searches and United States v. Thomas: The Second Circuit Takes a Bite Out of Place*, 19 LO. L.A. L. REV. 1097, 1099 n.16 (1986).

2. Kyle Hutson, Comment, *The Supreme Court Lets the Dogs Out: Reestablishing a Reasonable Suspicion Standard for Drug Dogs in Illinois*, 30 S. ILL. U. L.J. 335, 339 (2006).

3. 462 U.S. 696 (1983).

4. *Id.* at 707.

5. Hutson, *supra* note 2, at 340. The Pennsylvania and the New Hampshire constitutions “. . . more or less contained the same language as the Fourth Amendment . . .” and in both states their respective Supreme Courts held the dog sniff as a Fourth Amendment search after the *Place* decision. *Id.* at 340–41.

6. FLA. CONST. art. I, § 12.

7. U.S. CONST. amend. IV.

The purpose of this Note is to address the recent Florida Fourth District Court of Appeals decision *State v. Rabb*.⁸ In *Rabb*, the court held that a dog sniff conducted in the exterior of the home is a Fourth Amendment search.⁹ The court distinguished the factual scenario in *Rabb* from *Place* by focusing on the fact that in *Place* the use of the dog sniff was on baggage at an airport, while in *Rabb*, the use of the dog sniff was at a private residence.¹⁰ The court referred to the long-standing proposition that one's home is given extraordinary protection under Fourth Amendment jurisprudence¹¹ and cited *Kyllo v. United States*¹² as the controlling case in *Rabb*,¹³ stating that a dog sniff at the home violates the Fourth Amendment because:

[A]ny physical invasion of the structure of the home, “by even a fraction of an inch,” was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.¹⁴

This Note argues that a dog sniff, as conducted in *Rabb*, is not a Fourth Amendment search. Ultimately, this Note will contend that a dog sniff conducted in the exterior of a home open to public use does not violate a legitimate expectation of privacy at the home, and thus, is not a violation of the Fourth Amendment. Part II will briefly review relevant precedent on Fourth Amendment searches and dog sniffs. Part III will address the relevant precedent on dog sniffs at a dwelling place in Florida, namely the decision in *Nelson v. State*.¹⁵ Part IV will explain the court’s reasoning in *Rabb* from both the majority’s perspective and the dissent’s perspective. Part V will explain my criticisms and concerns of the *Rabb* decision. I will then conclude with why the decision in *Rabb* unduly burdens law enforcement and must be overturned.

II. THE FOURTH AMENDMENT

A. Search and Seizure

The Fourth Amendment provides a person with an individual expectation of privacy and protects against unreasonable governmental intrusion.¹⁶ There are two types of expectations that the Fourth Amendment provides; one involving searches, the other seizures.¹⁷ “A search occurs when an expectation

8. 920 So. 2d 1175, 1182 (Fla. 4th Dist. Ct. App. 2006).

9. *Id.* at 1187.

10. *See Id.* at 1183–84 (distinguishing *Place* as a factually different scenario than *Rabb* because *Place* involved a dog sniff of luggage while *Rabb* involved a dog sniff at the door of a home).

11. *See Payton v. New York*, 445 U.S. 573, 585–86 (1980) (quoting *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972) (“[T]he ‘physical entry of the home is the chief evil against which the wording of the fourth amendment is directed.’”); *see also Rabb*, 920 So. 2d at 1189.

Juxtapose against the realities of travel by car and plane, the house stands strong and alone, shrouded in a cloak of Fourth Amendment protection. A house is not movable or on display to the public (at least as far as its interior). The interior of the house is not pervasively regulated by government. If the Fourth Amendment has meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, this most sacred of places under Fourth Amendment jurisprudence.

Rabb, 920 So. 2d 1189

12. 533 U.S. 27 (2001).

13. *See Rabb*, 920 So. 2d at 1184–85 (relying on *Kyllo*, the court determined that a dog sniff intrudes into the “intimate details” of the home); *see also Payton v. New York*, 445 U.S. 573, 587 (1980) (distinguishing a private dwelling place from a public place, such that in a private dwelling place an individual is entitled to a higher level of privacy).

14. *Id.* at 1183 (quoting *Kyllo*, 533 U.S. at 37 (citation omitted)).

15. 867 So. 2d 534 (Fla. 5th Dist. Ct. App. 2004).

16. Joie M.B.C. Yuen, Casenote, *Kyllo v. United States: The Warrantless Use of Thermal Imagery Devices, and Why the Public Use Standard Proves Unworkable*, 24 HAWAII L. REV. 383, 386 (2001).

17. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

of privacy that society is prepared to consider reasonable is infringed. A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property."¹⁸ The United States Supreme Court has "consistently construed this protection as only applying to governmental action[,] " holding that the Fourth Amendment is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'"¹⁹

Moreover, it is well settled that searches and seizures of property in plain view are presumptively reasonable.²⁰ Whether it is residential or commercial, the basic principle is the same : "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."²¹ For example, the Court has found that a search and seizure of garbage left for collection outside the cartilage of the home, even absent a warrant, does not violate the Fourth Amendment.²² This is because aromas entering the public domain, "if and when they leave a building" are not subjectively held as private—an assumption otherwise is "not only implausible but also surely not 'one that society is prepared to recognize as reasonable.'"²³

B. *The Dog Sniff*

The United States Supreme Court has relied on two cases in determining that the use of a dog sniff is not a violation of the Fourth Amendment.²⁴ In the first case, *Place*, the Court first considered the question of whether a dog sniff constituted a search within the meaning of the Fourth Amendment.²⁵ In *Place*, law enforcement officers at an airport in Miami, Florida, became suspicious of a passenger because of his peculiar behavior.²⁶ Upon arriving in New York, the officers moved his bags to another airport and subjected them to a dog sniff.²⁷ The dog alerted to one bag.²⁸ The passenger was arrested after the bag was found to contain cocaine.²⁹

The Supreme Court held in *Place* that a dog sniff is not a search under the Fourth Amendment because "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search."³⁰ The decision in *Place* is applied as a general categorization, rather than a narrow holding applying only to dog sniffs of airplane luggage.³¹

18. *Id.*

19. *Id.* (citing *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

20. *Kyllo v. United States*, 533 U.S. 27, 42 (2001) (Stevens, J., dissenting) (citing *Payton v. New York*, 445 U.S. 573, 586 (1980)).

21. *Id.* at 42 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967))).

22. *See Californina v. Greenwood*, 486 U.S. 35, 40–41 (1988). According to the Court, because the defendants left the garbage in a public area they "had no reasonable expectation of privacy in the inculpatory items that they discarded." *Id.* at 41.

23. *Kyllo*, 533 U.S. at 43–44 (Stevens, J., dissenting) (quoting *Katz*, 389 U.S. at 361 (Halen, J., concurring)).

24. *See Fitzgerald (Fitzgerald II) v. State*, 864 A.2d 1006, 1009–1011 (Md. 2004). After analyzing the decisions in both *Place* and *Jacobsen*, the court held that: "*Place* and *Jacobsen* together establish that government tests, such as a [dog sniff], that can reveal only the presence or absence of narcotics and are conducted from a location where the government officials are authorized to be, *i.e.* a public place, are not searches." *Id.*

25. *United States v. Place*, 462 U.S. 696, 697–98 (1983).

26. *Id.* at 698.

27. *Id.*

28. *Id.* at 699.

29. *Id.*

30. *Place*, 462 U.S. at 707.

31. *Fitzgerald (Fitzgerald II) v. State*, 864 A.2d 1006, 1010–11 n.5 (Md. 2004). According to the court in *Fitzgerald II*: "The vast majority of state courts considering dog sniffs have recognized that a [dog] sniff is not a Fourth Amendment Search . . . [and] [o]f the remaining states considering the issue, most have held based on their state constitutions that a dog sniff is a search requiring reasonable suspicion." *Id.*

The second case, *United States v. Jacobsen*,³² affirmed the *Place* holding by relying on the limited scope of a field test as compared to a dog sniff.³³ In *Jacobsen*, a damaged package was subjected to a field test after employees of a private freight carrier observed a white powdery substance in the innermost of a series of four plastic bags.³⁴ In examining the nature of the dog sniff, the Court held that a government field test, like a dog sniff, does not offend an individual's Fourth Amendment rights because such tests do "not compromise any legitimate interest in privacy."³⁵ This is because the manner in which information is obtained through a field test, much like a dog sniff, does not offend a legitimate privacy interest—revealing only the presence or absence of contraband items.³⁶

Both *Place* and *Jacobson* establish that a dog sniff is not a search under the Fourth Amendment because of its narrow scope—it detects only illegitimate, contraband items.³⁷ Further, the two cases affirm that it is "the focus and nature of the [dog sniff], rather than on the object sniffed, in determining whether a legitimate privacy interest exists."³⁸

1. Impact of *Thomas*

However, the United States Court of Appeals for the Second Circuit, in the landmark decision *United States v. Thomas*,³⁹ held that a dog sniff conducted outside an apartment violated the Fourth Amendment.⁴⁰ In *Thomas*, an apartment was searched pursuant to a warrant that authorized a search for narcotics.⁴¹ The State claimed that probable cause existed in part because of a dog sniff outside the apartment door.⁴² Evidence seized was suppressed because the court determined that the dog sniff violated the defendant's Fourth Amendment rights.⁴³

In its decisions, the court "recognized the heightened privacy interest that an individual has in his dwelling place."⁴⁴ The court stated that a person in his home reasonably infers a full intention of privacy that society is prepared to respect, and a dog sniff at a dwelling place violates that expectation.⁴⁵

32. 466 U.S. 109 (1984).

33. See *Id.* at 123–24. In *Jacobsen*, the Court stated that:

[G]overnmental conduct that can reveal whether a substance is [a narcotic], and no other arguably "private" fact, compromises no legitimate privacy interest.

This conclusion is dictated by *United States v. Place* [citation omitted], in which the Court held that subjecting luggage to a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment

Here, as in *Place*, the likelihood that official conduct of the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.

Id.

34. *Id.* at 111–12.

35. *Id.* at 123.

36. See *Jacobsen*, 466 U.S. at 123 (holding that "[a] chemical test that merely discloses whether or not a particular substance is [a narcotic] does not compromise any legitimate interest . . ." and that ". . . all of the tests conducted under circumstances comparable . . ." compromise ". . . no legitimate interest").

37. See *Fitzgerald v. State (Fitzgerald II)*, 864 A.2d 1006, 1011 (2004) (holding that *Place* and *Jacobsen* together establish that a dog sniff conducted by a governmental official in a place they are constitutionally permitted to occupy is not a Fourth Amendment search because it only reveals "the presence or absence of narcotics").

38. *Id.*

39. 757 F.2d 1359 (2d Cir. 1985).

40. *Id.* at 1367 ("Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the [dog] sniff at his door constituted a search . . . [that] violated the Fourth Amendment.").

41. *Id.* at 1366.

42. *Id.*

43. *Id.* at 1367.

44. *Thomas*, 757 F.2d at 1366.

45. *Id.* (citing *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980)). In *Taborda*, the Second Circuit of the United States Court of Appeals suppressed contraband evidence found inside an apartment because it was spotted by law enforcement agents with the help of a high-powered telescope, which the court held as a violation of the Fourth Amendment because the telescope's use violated a reasonable expectation of privacy in the interior of a dwelling place. *Taborda*, 635 F.2d at 139. According to the court, "[t]he very fact that a person is in his own home raises a reasonable inference that he intends to

However, notably, the court: 1) failed to apply *Place*; and 2) discounted the fact that a dog sniff will disclose only the presence or absence of narcotics.⁴⁶

Essentially, the court determined the dog sniff intrusive in the apartment because it was a way “of detecting the contents of a private, enclosed place.”⁴⁷ Moreover, the court saw the dog sniff as a significant enhancement in law enforcement's ability to search via a “far superior, sensory instrument.”⁴⁸ Thus, because of the heightened expectation of privacy in the home, and because the court saw the dog sniff as an unlawful enhancement of searching capability for law enforcement, the court concluded that a dog sniff conducted outside a dwelling house violates the Fourth Amendment.⁴⁹

2. Impact of *Kyllo*

In *Kyllo*, the Supreme Court held the use of thermal imaging to detect heat inside a residence for the purpose of establishing the presence of marijuana as an unconstitutional search under the Fourth Amendment.⁵⁰ The Court held that the use of the thermal imager allowed law enforcement to use sense enhancing technology to intrude into the constitutionally protected area of the home.⁵¹ The Court reasoned that the feared injury is not the quality or quantity of information obtained through the search; but rather that law enforcement, via the thermal imager, used sense enhancing technology that crossed the “firm line” of the Fourth Amendment protection of the home.⁵² The Court simply stated that when the Government uses a device which is capable of revealing typically unknown, intimate details of the home, and when such device is not in general public use, the use of the device is presumptively a violation of an individual's Fourth Amendment rights.⁵³

III. DOG SNIFFS OF A DWELLING PLACE IN FLORIDA: The *NELSON V. STATE* DECISION

The decision in *Nelson* is pertinent to both the majority's and dissent's argument in *Rabb*. In *Nelson*, an officer took his drug dog to a hotel and walked the hallway outside of the defendant's room.⁵⁴ The dog sniffed all room entrance doors in the hallway, but alerted only at Nelson's door.⁵⁵ The information was then included in an affidavit to obtain a search warrant.⁵⁶ The defendant argued that management had no right to waive his privacy rights, which at the hotel, was the equivalent of his private

have privacy, and if that inference is borne out by his actions, society is prepared to respect his privacy.” *Id.* at 138; *see also* *United States v. Bonfiglio*, 713 F.2d 932, 937 (stating that “it was not the enhancement of the senses *per se* that was held unlawful in *Taborda*, but the warrantless invasion of the right to privacy in the home).

46. *See generally Thomas*, 757 F.2d at 1359–76.

47. *See id.* 757 F.2d at 1366–67. According to the court, “[a]lthough using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics [citation omitted] it remains a way of detecting the contents of a private, enclosed space.” *Id.*

48. *Id.* at 1367.

49. *See id.* (holding that a dog sniff is a sensory enhancing instrument that violates a legitimate expectation of privacy).

50. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (“Since we hold the Thermovision imaging to have been an unlawful search . . .”).

51. *See id.* (holding that “[w]here, as here, the Government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant”).

52. *See id.* at 37 According to the Court, “[t]he Fourth Amendment’s protection of the home has never been tied to measurement of the quality of quantity of information obtain[.]” but rather that “any physical invasion of the structure of the home, ‘by even a fraction of an inch,’ [is] too much.” *Id.*; *see also Silverman v. United States*, 365 U.S. 505, 512 (1961) (holding that eavesdropping accomplished by means of an unauthorized physical penetration into the home violates the Fourth Amendment and that any violation of the privacy of the home, “by even a fraction of an inch[.]” violates the Fourth Amendment).

53. *Kyllo*, 365 U.S. at 40.

54. *Nelson v. State*, 867 So. 2d 534, 536 (Fla. 5th Dist. Ct. App. 2004).

55. *Id.*

56. *Id.*

residence.⁵⁷ Also, the defendant argued that the police enlisted the use of a sensory enhancing technology—the narcotics dog.⁵⁸

However, in *Nelson*, the Florida Fifth District Court of Appeals reaffirmed the reasoning in *Jacobsen*, stating that “[b]ecause a dog’s sniff ‘could reveal nothing about non-contraband items,’ it does not generally intrude into a person’s reasonable expectation of privacy.”⁵⁹ Vital to the court’s decision in *Nelson* was its determination that areas “such as hallways, which are open to use by others may not be reasonably considered as private.”⁶⁰ The court saw the Fourth Amendment as inapplicable to any action taking place in the hallway in front of the hotel room because the defendant had no legitimate expectation of privacy that extended into the hallway.⁶¹ In accordance with that reasoning, the court held a dog sniff in the hallway was reasonable because “just as evidence in the plain view of offices may be searched without a warrant . . . evidence in the plain smell may be detected without a warrant.”⁶² Essentially, the court held that the drug dog’s alert was lawful because the dog sniff detected an illegitimate item—contraband—in a place where the defendant had no reasonable expectation of privacy.⁶³ Because of this, the court determined that the fact that a dog is a more skilled odor detector than a human is irrelevant.⁶⁴

Also, the court addressed the holding in *Thomas*, stating that it has been criticized by all federal courts who have considered it because of the *Thomas* court’s statement that “the defendant had a legitimate expectation that contraband in his closed apartment would remain private.”⁶⁵ The court discounted *Thomas* by affirming the point that the Supreme Court has held “that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed.”⁶⁶

IV. THE DECISION IN *STATE V. RABB*

A. *The Majority*

James Rabb was charged with criminal information for possession of controlled substances—including marijuana.⁶⁷ The charges were the result of the issuance and execution of a search warrant of

57. *Id.* The defendant in *Nelson* supported his argument with the decision in *United States v. Thomas*. *Id.*

58. *Nelson*, 867 So. 2d at 536 (“*Nelson* argues that the use of a dog’s sense of smell is tantamount to the use of a far superior, sensory instrument that enables a human being to detect articles normally discoverable only after entry into residences.”).

59. *Id.* at 537 (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 n.24 (1984)).

60. *Id.* at 535; *see also* *Brant v. State* 349 So. 2d 674, 675 (Fla. 3d Dist. Ct. App. 1977) (holding that because a hallway is a public place a person has no reasonable expectation of privacy to anything that enters therein).

61. *See Nelson*, 867 So. 2d at 537. According to the court in *Nelson*, “[i]t has long been recognized that reasonable expectations of privacy vary according to the context of the area searched[,]” and that “[t]he test of legitimacy is not whether the individual chooses to conceal assertedly ‘private’ activity . . . the correct inquiry is whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.” *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 182–83 (1984)); *see also* *O’Connor v. Ortega*, 480 U.S. 709, 719 (1987) (holding that the determination of whether a search is reasonable depends upon the context in which that search is conducted); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“[W]hat is reasonable depends on the context within which a search takes place.”). In *Nelson*, the court held that the defendant’s privacy expectation does not extend into the hotel room because it is a public corridor and that a dog sniff “detection of odor in common corridor does not contravene the Fourth Amendment.” *Nelson*, 867 So. 2d at 537.

62. *Nelson*, 867 So. 2d at 537; *see Harris v. United States*, 390 U.S. 234, 236 (1968) (“It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence.”); *United States v. Harvey*, 961 F.2d 1361, 1363 (8th Cir. 1992) (holding that a dog sniff of luggage in an airplane overhead compartment does not violate the Fourth Amendment because an individual has “no reasonable expectation of privacy in the ambient air surround their luggage”); *see also* *United States v. Pinson*, 24 F.3d 1056, 1058 (8th Cir. 1994) (holding that an individual has no reasonable expectation of privacy in heat that that is vented outside).

63. *See Nelson*, 867 So. 2d at 537 (“As a result, we hold that a trained dog’s detection of odor in a common corridor does not contravene the Fourth Amendment.”).

64. *Id.*; *see United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir. 1980) (holding that illegal odors smelled fall within the plain view doctrine and do not violate the Fourth Amendment).

65. *Nelson*, 867 So. 2d at 536.

66. *Id.* (quoting *United States v. Coyler*, 878 F.2d 469, 475 (D.C. Cir. 1989)).

67. *State v. Rabb*, 920 So. 2d 1175, 1178 (Fla. 4th Dist. Ct. App. 2006).

his home.⁶⁸ The warrant was obtained, in large part, as the result of a dog sniff at the front door of his residence.⁶⁹

Rabb filed a motion to suppress in circuit court, contending that the dog sniff at his front door was a "search" requiring a warrant; and absent a warrant the "search" was illegal.⁷⁰ The trial court entered an order granting the motion to suppress, finding that the dog sniff at Rabb's front door was a warrantless search, and absent the warrant there was a lack of independent, lawfully obtained information to support probable cause.⁷¹

On appeal, the Florida Fourth District Court of Appeals affirmed the lower court's motion to suppress.⁷² In its decision, the court sought to distinguish the use of a dog sniff over baggage at an airport from the use of a dog sniff at a private residence.⁷³ More precisely, the court distinguished the home and the luggage as different "places" that have different constitutional protections under the Fourth Amendment.⁷⁴

First, in citing *United States v. Katz*,⁷⁵ the stated that the Fourth Amendment protects people, not places—with the main question being what protections are afforded to those people at the 'place' in question.⁷⁶ The court then moved to an analysis of the Fourth Amendment implications as tied to the home—the "place" in question.⁷⁷ In doing this, the court distinguished *Place*'s factual scenario from the factual scenario in *Rabb* and applied the holding in *Thomas*—noting that that in *Place* the dog sniff occurred in a public airport, while in *Rabb*, like *Thomas*, the dog sniff occurred at a residence.⁷⁸ The court affirmed an individual's right to "retreat into his own home and there be free from unreasonable governmental intrusion."⁷⁹

Next, the court held *Kyllo* as the controlling case in *Rabb*.⁸⁰ It saw the use of the thermal imager in *Kyllo* and the dog sniff in *Rabb* as running parallel because both instruments enhanced the senses of

68. *Id.*

69. *Id.* at 1179.

70. *Id.*

71. *Id.* at 1180. In its decision, the trial court stated that the issue of a whether a dog sniff conducted at a residence constitutes a Fourth Amendment search is "...one of first impression in Florida." *Rabb*, 920 So. 2d at 1180. As such, the trial court considered *Thomas* as persuasive precedent in its holding that "... the use of the dog sniff of Rabb's house amounted to a warrantless search and could not support the issuance of the subsequent search warrant for Rabb's house." *Id.*

72. *Id.* at 1192.

73. *Id.* at 1184. The court held that "[w]e are of the view that luggage located in a public airport is quite different from a house, not only in physical attributes, but also in the historical protection granted by law." *Id.*

74. *See Rabb*, 920 So. 2d at 1183–84. According to the court, "[t]he function of 'place' in Fourth Amendment jurisprudence [is] instrumental . . . [and] '[p]lace' is no less key in the case at bar . . . [such that] 'a practice that is not intrusive in a public airport may be intrusive when employed at a person's home.'" *Id.* (quoting *United States v. Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985)).

75. 389 U.S. 347 (1967).

76. *See Rabb*, 920 So. 2d at 1182. "Furthermore, as Justice Harlan pointed out in his concurring opinion in *Katz*: 'As the Court's opinion states, "the Fourth Amendment protects people, not places." The main question, however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a "place."'" *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

77. *See Id.* ("When considering whether law enforcement at a house constitutes a search, it is necessary to consider the constitutional protections afforded a house throughout the long history of the Fourth Amendment.").

78. *Id.* at 1183. The court held that: "In *Place*, the United States Supreme Court was not addressing the use of law enforcement investigatory techniques at a house . . . but rather only whether a dog sniff of luggage in an airport constituted search under the Fourth Amendment." *Id.* The court referenced this distinction in the *Thomas* holding: "... [A] practice that is not intrusive in a public airport may be intrusive when employed at a person's home." *Rabb*, 920 So. 2d at 1184 (quoting *Thomas*, 757 F.2d at 1366).

79. *Silverman v. United States*, 365 U.S. 505, 511 (1961); *See Rabb*, 920 So. 2d at 1182 (quoting *Payton v. New York*, 445 U.S. 573, 585–86, 590 (1980) (quoting *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972))). The Supreme Court in *Payton* held that: "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Payton*, 445 U.S. at 589.

80. *Rabb*, 920 So. 2d at 1182 ("Given the shroud protection wrapped around the house by the Fourth Amendment, we conclude that *Kyllo* [citation omitted] controls the outcome of the case at bar.").

law enforcement to activities occurring behind the closed doors of a home.⁸¹ The court disregarded the fact that a dog sniff will only sense narcotics; and emphasized the point that law enforcement, by way of a dog sniff, can obtain information from inside the home that would otherwise remain private and protected under the Fourth Amendment.⁸² The court contended that although the drug dog smelled marijuana, that smell is still an “intimate detail” of Rabb’s home that is accorded Fourth Amendment protection.⁸³

The court then addressed the decision in *Nelson*. The court, “[f]or two main reasons . . .”⁸⁴ concluded that *Nelson* neither control[ed] nor conflict[ed]” with their decision in *Rabb*.⁸⁴ First, the court reasoned that although “‘occupants of a hotel room are entitled to the protection of the Fourth Amendment’ to much the same degree as occupants of a house, that principle is not without its limitations.”⁸⁵ The court stated that:

Despite the fact that an individual's Fourth Amendment rights do not evaporate when he rents a motel room, the extent of the privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attitudes of privacy of a home, it also possesses many features which distinguish it from a private residence: A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn, or other buildings, and also the area under his home. But a transient occupant of a motel room must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has sharing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surrounds that is entirely lacking in the enjoyment of one's home.⁸⁶

Simply, the court reasoned that although “a hotel room may be nearly identical to a house for Fourth Amendment purposes[,]” it is still not a house, and therefore, is not accorded the same constitutional protections as the home.⁸⁷ The court saw a hotel and home as having like privacy expectations under the Fourth Amendment—but the expectation of privacy surrounding the home was seen as higher because of the private nature of the home as compared to a hotel, where people knowingly subject themselves to public common areas, such as hallways.⁸⁸

81. See *Id.* at 1184. (“The use of the dog [sniff], like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb’s house, which is reasonably considered a search violative of Rabb’s expectation of privacy in his retreat.”).

82. *Id.*
[I]t is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in *Kyllo*, the quality of quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the house at all, or in this case, the fact that a dog’s sense of smell crossed the “firm line” of Fourth Amendment protection at the door of Rabb’s house.

Id.

83. *Id.* (“Because the smell of marijuana had its source in Rabb’s house, it was an ‘intimate detail’ of that house.”).

84. *Rabb*, 920 So. 2d at 1185.

85. *Id.*; see *Hoffa v. United States*, 385 U.S. 293, 301 (1966) (holding that: “What the Fourth Amendment protects is the security of man relies upon when he places himself or his property within a constitutionally protected area, be it his home or office, his hotel room or his automobile”).

86. *Rabb*, 920 So. 2d at 1185 (quoting *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir. 1979) (quoting *Marullo v. United States*, 328 F.2d 361, 363 (5th Cir. 1964))).

87. *Id.* at 1186.

88. See *Id.* According to the court:
[A hotel] is neither as private nor as sacrosanct [as a home]. As a result, the fact that the Fifth District [in *Nelson*] held that a trained canine’s dog sniff of hotel room does not violate the Fourth Amendment because the hotel corridor is a public area, does not conflict with our conclusion that the dog sniff of a private house, such as Rabb’s, violates the Fourth Amendment. This is so for the same reasons of “place” discussed . . . when determining that *Place* is not dispositive of this case, as it addressed public airports rather than private houses.

Id. at 1186.

The second distinction made between *Nelson* and *Rabb* is that in *Rabb* “the distinction between unaided and technologically-enhanced surveillance is not without a difference as suggested in *Nelson*.”⁸⁹ This was because in the home there is a risk of the odors of one's house being smelled by their neighbors, and the court saw that “there is no way to mitigate the risk of using dog sniffs where law enforcement unaided might be unable to smell illegal drugs growing in a house.”⁹⁰ The court contended that just as an individual's voice can never soften enough to mitigate against the risk of intrusive surveillance, the smells of an individual's home are not capable of softening enough to avoid detection by the “ultra-sensitive noses of dogs.”⁹¹

Moreover, the majority viewed “the reasonable expectation of privacy afford to locations along a hierarchy from public to private[.]”⁹² with the home having a greater expectation of privacy than a hotel.⁹³ The court reasoned that just because an individual expects the presence of the public in the hallway outside a hotel room, it does not mean that an individual expects the presence of the public in the immediate area outside their home.⁹⁴

B. *The Dissent*

The dissent contended that the dog sniff conducted in front of *Rabb*'s home does not violate the Fourth Amendment because it was conducted in the space in front of the door that is a public area accessible from the street.⁹⁵ This is based upon the contention that a “clear line of precedent” proves that “the space in front of the door [in *Rabb*] enjoyed no constitutional protection.”⁹⁶

As stated by the dissent: “[T]he Fourth Amendment does not necessarily protect areas of a home which are ‘open and exposed to public view.’”⁹⁷ Also, a person has no expectation of privacy on a front

89. *Id.* In its reasoning, the court drew a parallel to *United States v. Mankani*, 738 F.2d 538 (2d Cir. 1984) stating that “[t]he Fourth Amendment ‘protects conversations that cannot be heard except by means of artificial enhancement.’” *Rabb*, 920 So. 2d at 1186 (quoting *Mankani*, 738 F.2d at 543). In *Mankani*, the Second Circuit of the United States Court of Appeals explained that:

The risk of being overheard is given in modern life, and any time people speak to one another they necessarily assume that risk. “But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy.” Absent a warrant, this kind of investigative intrusion bypasses the safeguards of a neutral magistrate's predetermination of probable cause.

Mankani, 738 F.2d at 543 (citation omitted).

90. *Rabb*, 920 So. 2d at 1186. According to the court:

Because of the similarities highlighted . . . between the use of the thermal imager in *Kyllo* and the dog sniff in *Rabb*'s case, it would be difficult to posit the rationale of *Mankani* does not apply here. The risk of odors of one's house being smelled by the neighbors may be a “given of modern life,” but there is no way to mitigate the risk of using dog sniffs where law enforcement unaided might be unable to smell illegal drugs growing in a house.

Id.

91. *Id.* (“Just as an individual would never be able to soften his voice enough to mitigate the risk of intrusive surveillance, he would never be able to soften the smells of his house enough to avoid detection by the ultra-sensitive noses of dogs.”)

92. *Id.*

93. *See Id.* at 1186–87.

An airport and a highway are unquestionably public places with little or no privacy, as much as a home is undoubtedly a private place characterized by its very privacy. A hotel room lies somewhere in between, because although it possess some of the aspects of a home, it also possesses some of the aspects of the itinerant life present in airports and on highways.

Rabb, 920 So. 2d at 1186–87.

94. *Id.* at 1187 (“An individual expects the public to be ready present in hallways outside a hotel room door, but an individual does not expect the public to be readily present on the porch outside the door to a home.”).

95. *See Id.* at 1193 (Gross, J., dissenting) (“No Fourth Amendment violation occurred when the detectives and the dog went to the front door of *Rabb*'s residence, which was accessible from the street.”).

96. *Id.*

97. *Id.* (quoting *State v. Duhart*, 810 So.2d 972, 973 (Fla. 4th Dist. Ct. App. 2002)); *See e.g. Koehler v. State*, 444 So. 2d 1032, 1033 (Fla. 1st Dist. Ct. App. 1984) (holding that an individual has no expectation of privacy in an unenclosed porch that is open to public view.); *State v. Detlefson*, 335 So. 2d 371, 371 (holding that an individual has no expectation of

porch "where a salesmen or visitors may appear at any time."⁹⁸ Because nothing "prohibited the detectives from walking up to Rabb's door" and because, regardless of the dog sniff, "a police officer may approach and knock on a suspect's front door" without violating the Fourth Amendment—the dissent saw no Fourth Amendment violation.⁹⁹

Next, the dissent addressed the holding in *Place*, contending that the majority misread and essentially misapplied that ruling—arguing that there is no legal distinction between officers and a drug dog in an airport with a suspect's luggage, and officers and a drug dog at the front door of a residence.¹⁰⁰ In its reasoning, the dissent pointed to the holding in *Jacobsen*, emphasizing the narrow scope of a dog sniff, specifically the fact that when a dog alerts it will only alert to narcotics and no other information within the home.¹⁰¹ The dissent argued, based on these two holdings, that the dog sniff in *Rabb* did not offend a *legitimate expectation of privacy*.¹⁰² The dissent argued that the standard set forth by *Place* and *Jacobsen* has nothing to do with where a dog sniff takes place, or of where a subjective expectation of privacy is entertained.¹⁰³ Rather, because a dog sniff recognizes only narcotics, the commencement of a dog sniff at the door of a home does not offend the Fourth Amendment because an individual in possession of contraband in the home has no *legitimate expectation of privacy* as to that possession.¹⁰⁴

Thereafter, the dissent pointed to Florida precedent which, after the holdings of *Place* and *Jacobsen*, "consistently ruled that a canine sniff for contraband does not constitute a Fourth Amendment

privacy as to contraband plainly visible on a front porch); *see also* *California v. Ciraolo*, 476 U.S. 207, 213 (1986). In *Ciraolo*, the Supreme court held that:

The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

Ciraolo, 476 U.S. at 213.

98. *Rabb*, 920 So. 2d at 1193 (quoting *State v. Morsman*, 394 So. 2d 408, 409 (Fla. 1981)); *see* Fla. Dep't of Agric. & Consumer Servs. v. Haire, 836 So. 2d 1040, 1055 n.7 (Fla. 4th Dist. Ct. App. 2003) (noting that "[a]n unfenced front yard . . . is not generally considered protected by the Fourth Amendment due to the lack of expectation of privacy in what is visible to the entire public"); *Duhart*, 820 So. 2d at 973 ("Although it is well settled that one has an expectation of privacy in his home or its curtilage, the Fourth Amendment is not necessarily a protection in areas of the home . . . which are open and exposed to public view."); *Wysong v. State*, 614 So.2d 670, 671 (Fla. 4th Dist. Ct. App. 1993) ("It has been held that there is no reasonable expectation of privacy in the threshold of the home."); *Koehler v. State*, 444 So. 2d 1032, 1033 (Fla. 1st Dist. Ct. App. 1984) (determining that an unenclosed front porch is unprotected by the Fourth Amendment); *State v. Detlefson*, 335 So. 2d 371, 371 (Fla. 1st Dist. Ct. App. 1976) ("It cannot be said that defendant had a reasonable expectation of privacy in the front porch of his home where, presumably, delivery men and others were free to observe plants thereon.").

99. *Rabb*, 920 So. 2d at 1194; *see* *Potts v. Johnson*, 654 So. 2d 596, 599 (Fla. 3d Dist. Ct. App. 1995) (holding that "[a] police officer in the scope of his duties may approach a suspect's front door and knock in an attempt to talk to that suspect").

100. *See Id.* at 1197. According to the dissent:

The majority misreads *Place* when it asserts that "[t]he function of 'place' in Fourth Amendment jurisprudence was instrumental in the decision in *Place*." The majority erroneously suggests that the "feared injury" in this case is that "law enforcement endeavored to obtain information from inside the house at all."

There is no legal distinction between officers in an airport with the suspect's luggage, as in *Place*, and the officers and dog at the front door of *Rabb's* residence in this case. The Fourth Amendment did not preclude the officers in either case from being where they were when the [dog] sniff took place.

Id.

101. *See Id.* "[*Jacobsen*] provides a fuller rationale for why a narrowly focused investigative technique, one that reveals only the presence or absence of contraband, is not a Fourth Amendment 'search.'" *Id.*

102. *Rabb*, 920 So. 2d at 1198. "The Supreme Court observed that its holding in *Jacobsen* was 'dictated' by its ruling in *Place*; the Court referred to *Place's* holding that 'a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment.'" *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

103. *See Id.* at 1199. "Even though *Place* . . . did not involve a dog sniff at a residence, 'the rationale of *Place* and *Jacobsen* . . . had absolutely nothing to do with the locus either 1) of where the dog sniffing took place or 2) of where the subjective expectation of privacy was being entertained.'" *Id.* (quoting *Fitzgerald (Fitzgerald I) v. State*, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), *aff'd*, 864 A.2d 1006 (Md. 2004)).

104. *See Id.* at 1200. "It is the criminal nature of the possession itself that takes the activity out from under the protection of the Fourth Amendment, not the place where the possession occurs. *Rabb*, 920 So. 2d at 1200 (quoting *Fitzgerald I*, 837 A.2d at 1030)).

search.”¹⁰⁵ Specifically, the dissent pointed to *Flowers v. State*,¹⁰⁶ where the court held that a dog sniff of a vehicle is permissible under the Fourth Amendment because “its limited scope and method of investigation does not constitute a search.”¹⁰⁷

The dissent then sought to discount the majority’s reliance on *Thomas*, pointing to the fact that the majority of circuits have held the *Thomas* opinion as unsound.¹⁰⁸ For example, in *United States v. Coyler*,¹⁰⁹ the Court of Appeals for the District of Columbia challenged the reasoning in *Thomas*:

As an initial matter, the very correctness of *Thomas* decision is called into question by its assertion that the defendant “had a legitimate expectation that the contents of his closed apartment would remain private.” . . . the Supreme Court’s analyses in *Place* and *Jacobsen* indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can “reveal nothing about noncontraband items.”¹¹⁰

The dissent then moved to distinguish *Kyllo* on two key points. First, in *Kyllo*, the police used a thermal imaging device that detected unusual amounts of heat that could have resulted from criminal, or non-criminal activity within the home.¹¹¹ The thermal imaging device is “not limited to discovering the presence of absence of contraband drugs.”¹¹² However, a dog sniff detects only narcotics and does not expose the presence of “non contraband items, activities, or information that would otherwise be hidden from public view.”¹¹³

Second, the dissent distinguished *Rabb* from *Kyllo* by pointing to the fact that thermal imaging is an advanced technology that is not in public use, while a dog’s nose does not carrying such status.¹¹⁴ It argued that the sense of smell is a familiar tool of perception “much older than the common law or the Bill of Rights” and that dog reactions are historically admissible as evidence at trial.¹¹⁵ Simply, the dissent saw the use of a dog sniff as not sharing the technologically superior sense capabilities as the man-made thermal imager in *Kyllo*.

Lastly, the dissent addressed the majority’s analysis of *Nelson*.¹¹⁶ As stated by the dissent: “Seven words summarize the majority’s reasoning: A hotel room is not a house.”¹¹⁷ The dissent contended that “one has an expectation of privacy in a hotel room similar to that in a home. Both a hotel

105. *Id.* at 1198.

106. 755 So. 2d 708 (Fla. 4th Dist. Ct. App. 1999).

107. *Rabb*, 920 So. 2d at 1198 (quoting *Flowers*, 755 So. 2d at 710 (quoting *Daniels v. Cochran*, 654 So. 2d 609, 613 (Fla. 4th Dist. Ct. App. 1995)(citing *United States v. Place*, 462 U.S. 696, 707 (1984))).

108. *Rabb*, 920 So. 2d at 1201.

109. 878 F.2d 469 (D.C. Cir. 1989).

110. *Rabb*, 920 So. 2d at 1201 (citing *Coyler*, 878 F.2d at 475). In *Coyler*, the court determined that a dog sniff of an Amtrak roomette was not a Fourth Amendment search because its narrow scope reveals only items that are contraband in nature—to which a person has no legitimate expectation of privacy over because of their illegitimate status. *See Coyler*, 878 F.2d at 477 (holding that because a dog sniff does not detect noncontraband items, and because its scope is limited to such, it is not a search under the Fourth Amendment).

111. *See Rabb*, 920 So.2d at 1201. “In *Kyllo*, the police used a thermal imaging device to detect that unusual amounts of heat were being generated inside a home, ‘phenomenon that is not itself criminal and could well have been a non-criminal explanation.’” *Id.* (quoting *Fitzgerald (Fitzgerald I) v. State*, 837 A.2d 989, 1036 (Md. Ct. Spec. App. 2003), *aff’d* 864 A.2d 1006 (Md. 2004)).

112. *Id.* In its analysis the dissent distinguished the thermal imaging device from a dog sniff, stating: “The surveillance device was ‘a sophisticated piece of technology that revealed information, other than the presence of contraband, about the interior of *Kyllo*’s home.”” *Id.* (quoting *Wilson v. State*, 98 S.W.3d 265, 272 (Tex. Crim. App. 2002)).

113. *Id.* (citing *Rodriguez v. State*, 106 S.W.3d 224, 229 (Tex. Crim. App. 2002)).

114. *See Rabb*, 920 So. 2d at 1201–02. According to the dissent, “[t]he canine sense of smell is not the type of rapidly advancing technology that concerned the Supreme Court in *Kyllo*.” *Id.* at 1202.

115. *Id.* (citing *Fitzgerald I*, 837 A.2d at 1037).

116. *See Id.* at 1202 (“Finally, the majority opinion struggles at length to distinguish *Nelson* [citation omitted].”).

117. *Id.* at 1202–03.

hallway and front doorstep are open to the public. [Therefore] a dog sniff in each case should be judged the same.”¹¹⁸ In summation, “[w]hat is good for the home should be good for the Hilton.”¹¹⁹

V. CONCERNS AND CRITICISMS OF THE DECISION

A. *The Majority’s Deterrence from Place and Jacobsen*

The first flaw in the majority’s reasoning in *Rabb* is their misapplication and interpretation of *Jacobsen* and *Place*. In *Jacobsen* and *Place*, the Supreme Court held that a dog sniff is not a Fourth Amendment search and that a dog sniff’s ability to detect only narcotics is so narrowly limited that it does not violate a *legitimate* expectation of privacy.¹²⁰

Central to the Supreme Court’s holding in *Place* was the narrow focus of the dog sniff.¹²¹ A dog sniff discloses only the presence or absence of narcotics—making the information obtained by a dog sniff limited to illegitimate items.¹²² Simply, the Court stated that a “sniff test” by a trained narcotics detection dog was not a ‘search’ within the meaning of the Fourth Amendment because it does not violate a *legitimate* privacy interest.¹²³

Jacobsen then supplied the fuller rationale for why a narrowly focused investigative technique, like a dog sniff, is not a Fourth Amendment search.¹²⁴ Justice Stevens pointed out that “the Fourth Amendment is not a plenary prohibition against all unreasonable police activity . . . [it] is only a more limited protection against ‘[unreasonable] searches and seizures.’”¹²⁵ Further, the Court stated that a search only occurs when an individual “expectation of privacy that society is prepared to consider reasonable is infringed.”¹²⁶ The concept of an interest in privacy that society is prepared to recognize as reasonable is critically different from the mere expectation that certain facts will not come to the attention

118. *Rabb*, 920 So. 2d at 1203.

119. *Id.*

120. *See* Fitzgerald (*Fitzgerald I*) v. State, 837 A.2d 989, 1026 (Md. Ct. Spec. App. 2004). “The Supreme Court’s holding [in *Place*] was clear that the canine sniff was not a ‘search’ . . . central to its reasoning was the narrow focus of the dog sniff.” *Id.* (citing *United States v. Place*, 462 U.S. 696, 707 (1984) (holding that a dog sniff “did not constitute a ‘search’ within the meaning of the Fourth Amendment”). In *Fitzgerald I*, the court held that *Jacobsen*, although not a dog sniff case, “supplied the fuller rationale for why a narrowly focused investigative technique, one that reveals only the presence or absence of contraband, is not a Fourth Amendment ‘search.’” *Id.*

121. *Place*, 462 U.S. at 707. The Court held in *Place* that:

[T]he sniff discloses only the presence or absence of narcotics, a contraband item . . .

In these respects, the [dog] sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and the content of the information revealed by the procedure.

Id. (emphasis supplied).

122. *See Id.* “A ‘[dog] sniff’ by a well trained narcotics detection dog . . . does not expose noncontraband items that would remain hidden from public view.” *Id.*

123. *See Id.* (holding that because a dog sniff is “less intrusive than a typical search” and because a dog sniff is “discloses only the presence or absence of narcotics,” it does not “constitute a ‘search’ within the meaning of the Fourth Amendment”).

124. *Fitzgerald I*, 837 A.2d at 1026 (holding that *Jacobsen* “supplied the fuller rationale” for why a dog sniff is not a Fourth Amendment search). In *Jacobsen*, the Court’s rationale was that :

. . . [M]erely disclosing that the substance is something other than [a narcotic]—such a result reveals nothing of special interest. Congress has decided . . . to treat the interest in “privately” possessing [narcotics] as illegitimate; thus governmental conduct that can reveal a substance is [a narcotic], and no other arguably “private” fact, compromises no legitimate privacy interest.

United States v. Jacobsen, 466 U.S. 109, 123 (1984) (emphasis supplied).

125. *Fitzgerald I*, 837 A.2d at 1026 (citing *Jacobsen*, 466 U.S. at 113). In *Jacobsen*, Justice Stevens pointed out that: “The first Clause of the Fourth Amendment provides that the ‘right of people to be secure in their persons, houses, papers, and effects, against [unreasonable] searches and seizures, shall not be violated’” *Jacobsen*, 466 U.S. at 113 (emphasis supplied).

126. *Id.* at 1027

of authorities. As such, governmental conduct that only reveals whether a substance is an illegal narcotic compromises no legitimate privacy interest.¹²⁷

Thus, the likelihood that conduct revealed by a dog sniff will disclose private information that would compromise any *legitimate* interest in privacy seems much too remote to characterize a dog sniff as a search subject to the Fourth Amendment.¹²⁸ Simply, based on the *Place* and *Jacobsen* decisions, it is reasonable to hold that a police investigatory tool, such as a dog sniff, is not a search if it merely reveals the presence or absence of contraband.¹²⁹

Moreover, the rationale of the Supreme Court for treating a dog sniff as a non-search is that the binary nature of a dog sniff's inquiry—"contraband yea or nay?", precludes the possibility of infringing on any expectation of privacy that society objectively considers to be legitimate"—even at the home.¹³⁰ "It is the criminal nature of the possession itself that takes the activity out from under the protection of the Fourth Amendment, not the place where the possession occurs."¹³¹

B. *The Location of the Dog Sniff*

The next point of criticism in *Rabb* is the majority's disregard of the fact that the dog sniff occurred in a public place where the drug dog, "Chevy," had a constitutional right to occupy.¹³² In deciding whether a dog sniff is a Fourth Amendment search, the focus is on the location, or vantage point, from which the sniff is conducted. For instance, if the dog sniff is conducted in a public area it has a constitutional right to occupy, the sniff does not violate the Fourth Amendment.¹³³

127. See *Wilkes v. State*, 774 A.2d 420, 436 (Md. 2001).

Additionally, in *Jacobsen* [citation omitted] the Supreme Court considered whether a chemical test was a controlled dangerous substance was a search. The Supreme Court expanded on its holding in *Place* and held that a police investigatory tool, such as a dog sniff or a chemical test, is not a search if it merely reveals the presence or absence of contraband because the privacy interest in possessing contraband is not one that society recognizes as reasonable. "Here, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment."

Id. (quoting *Jacobsen*, 466 U.S. at 124) (emphasis supplied).

128. See *Gadson v. State*, 650 A.2d 1354, 1355 (Md. Ct. Spec. App. 1994). In *Gadson*, the court held that: "Whether the Fourth amendment was even involved, so as to require satisfaction, at that particular stage of the total investigative episode depends upon whether a sniff or smell by a drug detection dog constitutes a "search" within the contemplation of the Fourth Amendment. It does not." *Id.*

129. See *United States v. Coyle* 878 F.2d 469, 475 (D.C. Cir. 1989). According to the court in *Coyle*, "[t]he Supreme Court's analyses in *Place* and *Jacobsen* indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can 'reveal nothing about noncontraband items.'" *Id.* (citing *Jacobsen*, 466 U.S. at 124 n. 24).

130. *Fitzgerald I*, 837 A.2d at 1030. According to the court in *Fitzgerald I*, "[i]f the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home." *Id.*

131. *Id.*

132. See *Fitzgerald I*, 837 A.2d at 1028 (quoting *Gadson*, 650 A.2d at 1355–56). In *Gadson* the court, in analyzing whether a dog sniff outside of a closed trunk violated the Fourth Amendment, stated that:

The elementary physics of the olfactory sense, at least in circumstances such as these, is that the dog's nose never intrudes into a constitutionally protected area, such as the appellant's trunk. It is rather the case that the dog's nose remains outside, where the dog's nose has a constitutionally unassailable right to be, and that the suspicious and incriminating vapors come wafting across the public air to meet the dog's nose on the dog's nose's turf. We see no doctrinal difference, be the investigator man or beast, between standing outside and smelling aromas emanating from a truck, on the one hand, and standing outside and hearing sounds resonating from a truck, on the other. In each case, the sensory receptor remains outside where it has a right to be and the stimuli come to meet it there.

Gadson, 650 A.2d at 1355–56 (emphasis supplied).

133. See *United States v. Burns*, 624 F.2d 95, 101 (10th Cir. 1980) (citing *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977) (holding that "[i]t is well settled that the olfactory activities of a trained police dog legitimately on the premises do not constitute a search). In *Burns*, the court stated in its analysis of a Fourth Amendment search that:

What a person knowingly exposes is not constitutionally protected from observation. [citation omitted]. Neither are activities or objects which are exposed, regardless of subjective intent, in a manner inconsistent with reasonable expectations of privacy. [citation omitted]. Thus, it is not a "search" to observe that which occurs openly in public. [citation omitted]. Nor is it a search when a law enforcement officer makes visual

The Eighth Circuit of the United States Court of Appeals has affirmed this point in *United States v. Roby*,¹³⁴ where it took a firm stance about the unassailability of the dog's location and about the spot where the act of sensing occurs.¹³⁵ The court held that although the defendant contended that

[T]he dog's detection of the odor molecules emanating from his room is the equivalent of a warrantless intrusion. We find that it is not. The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. [citation omitted]. Just as evidence in the plain view of officers may be searched without a warrant, evidence in the plain smell may be detected without a warrant.¹³⁶

It is the fact that in *Rabb* the dog's nose was outside where it had a right to occupy, and that the contraband stimuli come out to meet, which holds the dog sniff in *Rabb* constitutionally permissible.¹³⁷

This was affirmed by *United States v. Reed*,¹³⁸ which held squarely that the critical spot for the constitutional assessment is not the place whence the odors emanate, but the place where the act of smelling occurs.¹³⁹ Just as the viewing by humans of contraband in plain sight does not amount to a Fourth Amendment search, the sniffing of contraband by a trained drug dog in a public area does not constitute a search.¹⁴⁰ As held in *Reed*: "As long as the observing person or the sniffing canine are legally present at their vantage when their respective senses are aroused by obviously incriminating evidence, a search within the meaning of the Fourth Amendment has not occurred."¹⁴¹

C. Coyler and Reed's Defeat of Thomas.

The majority has supported its position with the decision in *Thomas*. However, the *Thomas* opinion has been met with universal disapproval from "all of the federal and district courts that have considered it."¹⁴² As stated in *United States v. Hogan*,¹⁴³ "*Thomas* appears never to have been followed by any court outside the Circuit and has been criticized by several other circuit courts."¹⁴⁴

observations from a vantage point he rightfully occupies. [citation omitted]. This applies also to perceptions derive from hearing or smelling.

Id. at 100; see also *Venema*, 563 F.2d at 1007 (holding that a dog sniff of "the air outside [a] defendant's locker did not constitute a search . . . [and] it follows that the search of [the] defendant's locker did not violate his Fourth Amendment rights").

134. 122 F.3d 1120 (8th Cir. 1997).

135. See *Id.* at 1125 (holding that a dog sniff conducted outside a hotel room in a common area does not violate the Fourth Amendment).

136. *Id.* at 1124-25 (emphasis supplied).

137. See *State v. Rabb*, 920 So. 2d 1175, 1195 (Fla. 4th Dist. Ct. App. 2004) (stating that "[n]o Florida court has ever held that an officer's smelling of marijuana at the front door of a residence is a Fourth Amendment search that requires a warrant").

138. 141 F.3d 644 (6th Cir. 1998).

139. *Id.* at 649. In *Reed*, the court squarely held that:

Just as the sniffing of contraband by trained [drug dogs] does not constitute an unlawful search, neither does the viewing by humans of contraband in plain sight amount to an unlawful search. As long as the observing person or the sniffing [drug dog] are legally present at their vantage when their respective senses are aroused by obviously incriminating evidence, a search within the meaning of the Fourth Amendment has not occurred.

Id.

140. *Id.*

141. *Id.*; see also *State v. Funkhouser*, 782 A.2d 387, 396 (Md. Ct. Spec. App. 2001) (holding that a drug dog's " . . . smelling or sniffing of the exterior surface of an otherwise protected repository . . . is not a 'search' within the contemplation of the Fourth Amendment").

142. *Fitzgerald I*, 837 A.2d at 1031. "[T]he very correctness of the *Thomas* decision is called into question by its assertion that the defendant 'had a legitimate expectation that [contraband] in his closed apartment would remain private.'" *United States v. Coyler*, 878 F.2d 469, 475 (D.C. Cir. 1989) (citing *United State v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985). " . . . [A] possessor of contraband can maintain no legitimate expectation that its presence will not be revealed." *Id.*

143. 122 F. Supp. 2d 358 (E.D.N.Y. 2000).

144. *Id.* at 369.

For example, in *Coyler*, the District Circuit Court of Appeals for the District of Columbia questioned the *Thomas* court's reasoning; specifically because of its statement that a defendant "'had a legitimate expectation that the contents of his closed apartment would remain private.'" ¹⁴⁵ The court in *Coyler* affirmed the Supreme Court's analyses of both *Place* and *Jacobsen*—stating that a possessor of contraband can maintain no legitimate expectation of privacy as to that possession. ¹⁴⁶ The court held that a dog sniff of the exterior of a dwelling place, an Amtrak roomette, is not a Fourth Amendment search because of the limited and binary nature of the canine inquiry to detect *only illegitimate* contraband items. ¹⁴⁷

Moreover, in *Reed*, the Sixth Circuit of the United States Court of Appeals joined the District of Columbia Circuit in criticizing the reasoning in *Thomas*—stating that the *Thomas* holding ignored the Supreme Court's determination in *Place* that a person has no legitimate privacy interest in the possession of contraband. ¹⁴⁸ *Reed* affirmed the point in *Place* that it is the ability of a dog sniff to detect only the presence or absence of narcotics that allocates it Fourth Amendment protection. ¹⁴⁹

D. *Kyllo is Inapplicable*

The majority in *Rabb* stated that the decision *Kyllo* controlled—holding that a dog sniff is a sensory enhancing technology. ¹⁵⁰ However, a dog's nose is not a sensory enhancing technology like the thermal imager discussed in *Kyllo* because, unlike a dog sniff that detects on the presence or absence of narcotics, the thing detected by a thermal imager is the unusual amounts of heat generated inside the home—"a phenomenon that is not itself criminal and could well have had a non-criminal explanation." ¹⁵¹ For example, the thermal imager may detect legitimate activity like "what hour each night the lady of the house takes her daily sauna." ¹⁵² Thus, unlike a dog sniff, the surveillance device used in *Kyllo* is a sophisticated piece of technology that reveals legitimate information other than the presence or absence of narcotics. ¹⁵³

¹⁴⁵ *Coyler*, 878 F.2d at 475 (quoting *Thomas*, 757 F.2d at 1367).

¹⁴⁶ *Id.* In *Coyler* the court held that: "*Place* and *Jacobsen* indicate that possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can 'reveal nothing about noncontraband items.'" *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 n. 24 (1984)).

¹⁴⁷ *See Coyler*, F.2d at 474 (holding that "because of the binary nature of the information disclosed by the [dog] sniff, no legitimately private information is revealed").

¹⁴⁸ *United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998). "[The *Thomas*] holding ignores the Supreme Court's determination in *Place* that '[n]o legitimate expectation of privacy is impinged by governmental conduct that can 'reveal nothing about noncontraband items.''" *Id.* (citing *Coyler*, 878 F.2d at 475 (quoting *Jacobsen*, 466 U.S. at 124 n.24)).

¹⁴⁹ *See Id.* at 649.

The Supreme Court has held that a "[dog] sniff" does not unreasonably intrude upon a person's reasonable expectation of privacy. [citation omitted]. This is so, because "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item.

Id. (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

¹⁵⁰ *State v. Rabb*, 920 So.2d 1175, 1184 (Fla. 4th Dist. Ct. App. 2006). "This logic is no different than that expressed in *Kyllo* . . . [t]he use of the dog, like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house." *Id.*

¹⁵¹ *Fitzgerald I*, 837 A.2d at 1036. The dissent in *Rabb* distinguished *Kyllo* from *Rabb* by stating that: In *Kyllo*, the police used a thermal imaging device to detect that unusual amounts of heat were being generated inside a home, a "phenomenon that is no itself criminal and could well have been a non-criminal explanation. [citation omitted]. The surveillance device was "a sophisticated piece of technology that revealed information, other than the presence of contraband, about the interior of *Kyllo*'s home.

Rabb, 920 So. 2d at 1201 (Gross, J., dissenting) (citing *Wilson v. State*, 98 S.W.3d 265, 272 (Tex. Crim. Ct. App. 2002)).

¹⁵² *Kyllo v. United States*, 533 U.S. 27, 38 (2001).

¹⁵³ *See Rodriguez v. State*, 106 S.W.3d 224, 229 (Tex. Crim. Ct. App. 2003).

[A] government investigative technique, such as a dog sniff, that discloses only the presence or absence of narcotics, and does not expose noncontraband items, activity, or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and is thus not a "search" for Fourth Amendment purposes. [citation omitted]

Further, the Court's concern in *Kyllo* was with the unfamiliarity of technology not in general public use as used by law enforcement when conducting a warrantless search of the home—holding that when the government uses such a device, the surveillance is a “search.”¹⁵⁴ However, the investigative use of a dog sniff is not even considered “technology.”¹⁵⁵ Rather,

It is, *a fortiori*, not an unfamiliar or rapidly advancing technology that “is not in general use.” Bloodhounds have been chasing escaping prisoners and other fugitives through the swamp for hundreds of years, with posses following dutifully and trusting implicitly in the canine expertise, even at the closed doors of cabins and houses. The canine reactions, moreover, have traditionally been admissible as evidence even at a trial on the merits, let alone in an *ex parte* application for a warrant.

The use of the sense of smell generally is a familiar tool of perception much older than the common law Bill of Rights.¹⁵⁶

Simply, the dog's sense of smell is not an “arcane science known only to the police,” but rather, part of the foundation of America's general culture.¹⁵⁷ The Supreme Court recognized the sense of smell as a permissible law enforcement device as early as *Taylor v. United States*,¹⁵⁸ where the Court stated that “[p]rohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime.”¹⁵⁹

Therefore, *Kyllo* should not have been the controlling case in *Rabb* because there is nothing in *Kyllo* that brings into question whether the dog sniff in *Rabb* violated the Fourth Amendment—especially because a dog sniff does not share the same technological prowess as a thermal imager.¹⁶⁰

E. Nelson Does Apply

The majority in *Rabb* should have applied *Nelson* because “[w]hat is good for the home should be good for the Hilton.”¹⁶¹ Because a hotel and a home share an almost identical privacy interest, and because in both *Nelson* and *Rabb* the drug dog alerted in a public area, the *Nelson* decision was applicable.¹⁶² Further, as stated in *Nelson*, the true “test of legitimacy is not whether the individual chooses to conceal assuredly ‘private’ activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.”¹⁶³ It is not

By contrast, the use of a thermal imaging device to record the heat being emitted from within a home—the issue in *Kyllo*—is a “search” because it can reveal information, *other than the presence of contraband*, about the interior of a home. [citation omitted]

The dog's sniff in this case did not explore the details of the house; nor could the sniff reveal anything about the house other than the presence of an illegal narcotic [citation omitted] . . . the drug dog sniff . . . d[oes] not intrude on a legitimate expectation of privacy, it [i]s not a search and thus not an illegal one.

Id. (citing *Wilson*, 98 S.W.3d at 272).

154. See *Kyllo*, 533 U.S. at 34 (holding that by “obtaining by sense-enhancing technology any information regarding the interior of the home . . . constitutes a search—at least where . . . the technology . . . is not in general public use”).

155. *Fitzgerald I*, 837 A.2d at 1037 (“The investigative use of the animal sense, human or canine, cannot even be defined as a technology.”).

156. *Id.*

157. *Id.* (“The use of the dog's sense of smell is not an arcane science known only to the police; it is something deeply ingrained in our general culture.”).

158. 286 U.S. 1 (1932).

159. *Id.* at 6.

160. See *State v. Rabb*, 920 So. 2d 1175, 1202 (Fla. 4th Dist. Ct. App. 2006) (“The [dog] sense of smell is not the type of rapidly advancing technology that concerned the Supreme Court in *Kyllo*.”).

161. *Rabb*, 920 So. 2d at 1203 (Gross, J., dissenting); see *Hoffa v. United States*, 385 U.S. 293, 301 (1966) (holding that: “What the Fourth Amendment protects is the security of man relies upon when he places himself or his property within a constitutionally protected area, be it his home or office, his hotel room or his automobile”).

162. See *Rabb*, 920 So. 2d at 1203. “[O]ne has an expectation of privacy in a hotel room similar to that in a home. Both a hotel hallway and front doorstep are open to the public. The dog sniff in [both *Nelson* and *Rabb*] should be judged by the same standards.” *Id.*

163. *Nelson v. State*, 867 So. 2d 534, 537 (Fla. 5th Dist. Ct. App. 2004) (quoting *Oliver v. United States*, 466 U.S. 170, 182–83 (1984)).

the location of the dog sniff that decides whether the sniff violates the Fourth Amendment, but rather what the dog is detecting; and a well-trained narcotics dog will detect only the presence or absence of narcotics—an item whose possession is illegitimate *anywhere*, including a hotel and the home.¹⁶⁴

VI. CONCLUSION

The majority in *Rabb* incorrectly held that the dog sniff conducted outside the home in *Rabb* was unconstitutional. This is because the dog sniff did not offend a *legitimate* expectation of privacy, and because the dog sniff is *not* a sense enhancing technology like the thermal imager in *Kyllo*.

Furthermore, the use of drugs is still an ongoing problem not only in Florida, but in the United States; especially the use of Marijuana—the most widely used illicit drug in the United States.¹⁶⁵ Further, the majority of marijuana acquisitions—57%—are made inside a home, apartment, or dormitory, with 87% of marijuana user’s most recent acquisitions occurring indoors.¹⁶⁶ These statistics indicate that drug use is still central in indoor places—such as the home.

The use of the dog sniff gives law enforcement a valuable tool in battling drug use because it has a minimal risk of violating an individual’s privacy interest by revealing only substances that a person has *no legitimate* expectation of privacy over.¹⁶⁷ Essentially, the dog sniff aids law enforcement and does not unnecessarily infringe on an individual, legitimate privacy interest.

Moreover, when the risk of offending only a criminal’s illegitimate expectation of privacy is weighed against the benefits of pinpointing drug possession in a dwelling place, there is no Fourth Amendment violation—but rather a legitimate exercise of law enforcement. I contend that the Framers of the United States Constitution did not intend for the Fourth Amendment to protect the illegitimate expectation of privacy over criminal activity.

The decision in *Rabb* runs the risk of handcuffing policemen in Florida as they try to battle the war on drugs; especially in dwelling places where, as shown by the statistics above, drug acquisitions are apparent. Also, if other districts follow the *Rabb* holding it may lead to negative effects in the battle against drug use in the United States. It is imperative that this case is overturned so that its reasoning is not followed by other courts in the future.

164. See *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005). In *Caballes*, the Supreme Court held that it treats a “[Dog] sniff by a well-trained narcotics-detection dog as ‘*sui generis*’ because ‘it discloses only the presence or absence of narcotics, a contraband item. [citation omitted]

Accordingly, the use of a well-trained narcotics-detection dog—one that “does not expose noncontraband items that otherwise would remain hidden from public view [citation omitted] . . . generally does not implicate legitimate privacy interests.”

. . . [Further], [a] dog sniff conducted . . . reveals no information other than the location of a substance that no individual has any right to possess”

Id. (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

165. Jonathan P. Caulkins & Rosalie Liccardo Pacula, *Marijuana Markets: Inferences From Reports by the Household Population*, 36 J. DRUG ISSUES 173, 191–92 (2006).

166. *Id.* at 179, 191.

167. *Nelson*, 867 So. 2d at 537 (holding that “[b]ecause a dog sniff ‘could reveal nothing about non-contraband items,’ it does not generally intrude into a person’s reasonable expectation of privacy”) (citing *United States v. Jacobsen*, 466 U.S. 109, 124 n.24 (1984)).